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Supreme Court, U.S.
FILED
JUN 26 2009
OFFICE OF THE CLERK

No. 08-
09-7

IN THE
Supreme Court of the United States

JAMES STEVENS,

Petitioner,

v.

VONS COMPANIES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION SIX

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the State of California is thwarting proper constitutional analysis of punitive damages by maintaining and applying its own separate test to assess such damages, when the test (1) substantively alters the criteria articulated in United States Supreme Court decisions as the measures by which punitive damages need be evaluated, and (2) substitutes "abuse of discretion" instead of "de novo" as the standard of review.

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OPINIONS BELOW

The order of the Supreme Court of California denying James Stevens' petition for review, Pet. App. 48a, is reported at 2009 Cal.LEXIS 3613 (April 1, 2009).

The order of the California Court of Appeal, Second Appellate District, Division Six, denying rehearing, Pet. App. 47a, is reported at 2009 Cal.App.Unpub. LEXIS 1306 (February 18, 2009).

The opinion of the California Court of Appeal, Second Appellate District, Division Six, Pet. App. 1a-33a, is reported at 2009 Cal.App.Unpub.LEXIS 412 (January 12, 2009).

The judgment of the Superior Court of Ventura County, Pet. App. 40a-46a, and the subsequent order of remittitur, Pet. App. 34a-39a, are unreported.

JURISDICTION

The order of the Supreme Court of California denying Mr. Stevens' petition for review was entered on April 1, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Amendment XIV to the Constitution of the United States

§ 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In his case for sexual harassment and retaliation in violation of California's Fair Employment & Housing Act, plaintiff James Stevens – Petitioner herein – won a compensatory damages award of $1,672,988 and a punitive damages award of $16,729,880 from a jury in the Superior Court of Ventura County. *See* Pet. App. 12a-13a. After the trial court reduced each award to $1.2 million on remittitur (Pet. App. 39a), defendant Vons appealed, and plaintiff filed a cross-appeal with respect to the reduction of punitive damages.

On appeal, Petitioner argued that the punitive damages awarded by the jury, in a 10-to-1 ratio to compensatory damages, fell "within the maximum constitutionally permissible award" and asked that the

jury award "be reinstated, or, in the alternative, [that] the punitive damages award . . . be increased to the absolute constitutional maximum." *See* Pet. App. 27a.

In support of his argument, Petitioner relied on United States Supreme Court pronouncements on the constitutionality of punitive damage awards, as incorporated into the California Supreme Court's decision in *Simon v. San Paolo U.S. Holding Co.*, 35 Cal.4th 1159 (2005). *See* Pet. Att. 27a. The California Court of Appeal for the Second Appellate District, Division Six, however, rejected that line of analysis without explanation. "Respondent's reliance on *Simon* is misplaced," its opinion stated. "The controlling authority for excessiveness under California law is *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910." *See* Pet. Att. 27a-28a. The appellate court went on to affirm the reduced punitive damages. *See* Pet. Att. 33a.

Punitive damages in California are assessed by different criteria under *Neal* than they are under this Court's decisions. *Neal* considers a defendant's wealth or financial condition to be an "essential factor" in punitive damages analysis but takes no account of civil penalties as a measure of comparison, as required by *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 583 (1996), and its progeny. In addition, *Neal* allows an abuse of discretion standard to govern punitive damages analysis, even though cases since *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001), have made clear that de novo review is warranted whenever courts are determining the constitutionality of punitive damages.

The appellate court declined to address this conflict by denying a Petition for Rehearing (Pet. App. 47a), and the California Supreme Court denied review on April 1, 2009. *See* Pet. App. 48a. Accordingly, Mr. Stevens timely and respectfully petitions for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

Ever since decisions of this Court started lending punitive damage awards a constitutional dimension by considering excessiveness to be a Due Process violation, cases in California have suffered a lack of uniformity and certainty, given that two separate and conflicting standards – one state, one federal – have emerged with regard to the assessment of punitive damages. One line of analysis, following *Neal*, 21 Cal.3d 910, determines excessiveness under state law, while another probes constitutionality under federal law, as articulated by *State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), and its predecessors, *BMW*, 517 U.S. 559, and *Cooper Industries*, 532 U.S. 424. The cases do not delineate, however, the circumstances that trigger analysis under *Neal* as opposed to federal constitutionality.

The distinction presents a critical issue of law, since *Neal* applies a deferential abuse of discretion standard, whereas constitutional analysis requires "exacting" de novo review. Indeed, the issue raises questions about the very role and function of appellate courts reviewing punitive damages.

In the present case, a jury awarded Petitioner punitive damages in a 10-to-1 ratio to compensatory damages for suffering sexual harassment and retaliation

in the workplace. Although this ratio implicated constitutional limits, the appellate court discarded due process analysis and chose to proceed solely under *Neal*, ruling – without explanation – that it was the governing standard.

This Court should grant certiorari to determine whether California is thwarting proper constitutional analysis of punitive damages by applying its own separate test to assess such damages, when the test (1) substantively alters the criteria articulated in United States Supreme Court decisions as the measures by which punitive damages need be evaluated, and (2) substitutes "abuse of discretion" instead of "de novo" as the standard of review.

I. CALIFORNIA STANDARDS ASSESSING THE EXCESSIVENESS OF PUNITIVE DAMAGES CONFLICT WITH THIS COURT'S STANDARDS ASSESSING THEIR CONSTITUTIONALITY.

With regard to punitive damages, California cases confront two conflicting – and unreconciled – sets of standards. One line of analysis, under the leading case of *Neal*, 21 Cal.3d 910, assesses the "excessiveness" of punitive damages as a matter of state law. A second line of analysis, under *Simon*, 35 Cal.4th 1159, determines whether they are excessive under the federal Constitution's due process protections set forth "in a series of [United States Supreme Court] decisions culminating in *State Farm*." *Id.* at 1171. Tension and uncertainty exist, however, as to which line of analysis applies in any particular case. For instance, *Simon* "addresses only the federal constitutional question, not any issue of excessiveness under California law," yet does

not indicate why. *Id.* at 1167. Of course, which analysis applies is a matter of utmost importance, since different substantive standards lead to different outcomes – and inconsistent results. In the present case, the appellate court opted to proceed under *Neal* to uphold a reduction of punitive damages, whereas federal cases like *State Farm* would have dictated a contrary result – that is, affirmance of the jury's original award.

California law considers the "excessiveness" of punitive damages. Courts determine whether an award "as a matter of law *appears* excessive" or if "the recovery is so grossly disproportionate as to raise a presumption that it is the result of passion or prejudice." *Neal*, 21 Cal.3d at 928 (emphasis added). Judging excessiveness based on appearance is a tenuous proposition, and the California Supreme Court itself has recognized that "the determination of whether an award is excessive is admittedly more art than science." *Adams v. Murakami*, 54 Cal.3d 105, 112 (1991). "The channeling of just the correct quantum of bile to reach the correct level of punitive damages is, to put it mildly, an unscientific process complicated by personality differences." *Id.* (*quoting Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.*, 155 Cal.App.3d 381, 388 (1984)).

Federal analysis articulates a different question – whether the "imposition of 'grossly excessive or arbitrary' awards is constitutionally prohibited" as violative of due process protections. *Simon*, 35 Cal.4th at 1171. A "grossly excessive" punitive damages award, as this Court has ruled, "constitutes an arbitrary deprivation of property" in violation of the Fourteenth Amendment. *State Farm*, 538 U.S. at 416-417.

In the present case, even though a punitive damages award with a 10-to-1 ratio was under examination, the appellate court declined to conduct a federal due process analysis, insisting that Petitioner's reliance on *Simon* – and its application of *State Farm*'s dictates – was "misplaced." *See* Pet. App. 27a. Rather, the appellate court insisted that "[t]he controlling authority for excessiveness under California law is *Neal*." *See* Pet. App. 28a. There was no attempt to explain why one standard was being discounted for another, even though an alternate choice would alter the analysis – and the ultimate result.

A. California Considers a Defendant's Wealth, a Criterion This Court Disapproves in Favor of Using Civil Penalties as a Measure of Comparison.

Substantive state and federal guidelines as to what factors are considered in assessing punitive damages differ. *Neal* dictates that a reviewing court examine the reprehensibility of the conduct involved, the relationship between the compensatory and punitive damages, and "the wealth of the particular defendant." 21 Cal. 3d at 928. *Neal* recognizes that "the function of deterrence will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort." *Id.* at 928. In fact, *Simon* interprets *Neal* to emphasize that "the defendant's financial condition is an essential factor in fixing an amount that is sufficient" to serve the goal of deterrence "without exceeding the necessary level of punishment." 35 Cal.4th at 1185.

This "essential factor" of the defendant's wealth, however, is not even figured into the federal calculus as articulated by *Simon* (citing precedent from this Court). This Court has actually been troubled by the fact that "the preservation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses." *State Farm*, 538 U.S. at 417. Instead, the federal analysis substitutes an altogether different factor – "the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Id.* at 418; *Cooper Industries*, 532 U.S. at 440; *BMW*, 517 U.S. at 575. While the federal guidelines retain the reprehensibility of defendant's conduct as a factor, even their consideration of the ratio between compensatory and punitive damages is modified to consider "the disparity between the actual or *potential* harm suffered by the plaintiff and the punitive damages award." *State Farm*, 538 U.S. at 418 (emphasis added); *cf. Cooper Industries*, 532 U.S. at 440.

An unresolved tension exists, then, between these two lines of analysis, with no clear demarcation as to which applies to a given case and how that determination is made. *Simon* limits its discussion "only to the federal constitutional question, not any issue of excessiveness under California law" (35 Cal.4th at 1167), without offering a rationale as to the inapplicability of the *Neal* standard. In similarly summary fashion, the appellate court in this case simply declared Petitioner's reliance on *Simon* to be "misplaced." *See* Pet. App. 27a. It went on to assess punitive damages under *Neal*, calling it "[t]he controlling authority for excessiveness under California law." *See* Pet. App. 28a.

It is doubtful that *Neal* itself would pass constitutional muster today, given that its 74-to-1 punitive-to-compensatory damages ratio (21 Cal.3d at 920, 927) would be unlikely to survive scrutiny under federal due process. Therefore, it seems to serve as an anomalous basis for declaring a 10-to-1 ratio excessive without engaging in any constitutional analysis. After all, the measure of punitive damages in Petitioner's case under a constitutional standard would have led to a different result – given that punitive damages awards that do not exceed a single-digit ratio "to a significant degree" are likely to fall within constitutionally permissible limits. *State Farm*, 538 U.S. at 425.

Petitioner requests that this Court issue a writ of certiorari to address a standard of analysis that conflicts with its prior rulings and yields outcomes inconsistent with constitutional requirements.

II. PUNITIVE DAMAGES UNDER CALIFORNIA CASE LAW MAY BE REVIEWED ALONG AN "ABUSE OF DISCRETION" STANDARD, CONTRARY TO THIS COURT'S MANDATE THAT CONSTITUTIONAL REVIEW OF SUCH DAMAGES BE "DE NOVO."

Differing state and federal standards governing the review of punitive damages yield incongruent results, since cases like *Cooper Industries* have made clear that constitutional analyses of punitive damages require independent de novo review, yet California cases under *Neal* follow a deferential abuse of discretion standard – the standard that was followed by the appellate court in the present case. The existence of dual standards leads to lack of uniformity in judicial decisions warranting address by this Court.

The California Supreme Court has acknowledged in *Simon* that

> [i]n deciding whether an award of punitive damages is constitutionally excessive under *State Farm* and its predecessors, we are to review the award de novo, making an independent assessment of the reprehensibility of the defendant's conduct, the relationship between the award and the harm done to the plaintiff, and the relationship between the award and the civil penalties authorized for comparable conduct.

35 Cal.4th at 1172.

That constitutional issues pertaining to punitive damages merited de novo review was established, in no uncertain terms, in *Cooper Industries*, 532 U.S. at 431. *Cooper Industries* endorsed that standard so that courts could achieve consistency in their application of legal principles. *Id.* a 436. Further, it recognized "[d]ifferences in the institutional competence of trial judges and appellate judges" and concluded that these "[c]onsiderations of institutional competence . . . fail to tip the balance in favor of deferential appellate review" (*id.* at 440), supporting independent appellate review instead.

Of utmost importance, *Cooper Industries* pointed out that independent appellate review could likely lead to a different outcome in a case. *Id.* at 441. Despite that practical, real world effect, the California Supreme Court sanctions the continued review of cases pursuant to an

abuse of discretion standard. It let stand the appellate court's assessment of Petitioner's case under an abuse of discretion standard, even though the punitive damages awarded to him in a 10-to-1 ratio implicated de novo constitutional analysis.

Indeed, even as it establishes that "[t]he requirement of independent review applies to state as well as federal appellate courts when assessing excessiveness under the federal due process clause," the California Supreme Court concedes in *Simon* that "when no federal due process is involved, as when awards are reviewed for excessiveness under *state* law, the high court's decisions do not forbid greater deference to jury verdicts or trial court judgments." 35 Cal.4th at 1172, fn. 2. *Neal* indicates, for example, that the standard for reviewing trial court reductions of punitive damages becomes abuse of discretion. Quoting well-settled precedent, *Neal* provides that when a trial court's actions

> in granting a new trial on the ground of excessive damages, or requiring a reduction of the amount as the condition of denying one, comes to be reviewed on appeal, his order will not be reversed unless it plainly appears that he abused his discretion. 21 Cal.3d at 932-933.

Whether an appellate court reviews an award of punitive damages de novo or under an abuse of discretion standard can thus devolve into a matter of chance. If a trial court were to issue a remittitur, for example, it would trigger the deferential abuse of discretion standard. At the same time, the existence

of two standards would be susceptible to legal manipulation, as parties might choose to rely on (or ignore) constitutional claims to trigger de novo review. Substantive review of punitive damages would thereby become subordinated to procedural posture.

In the present case, the appellate court adhered to the abuse of discretion standard, stating, "We will reverse the court's order only if the record is devoid of any substantial basis supporting the remittitur. In determining whether a substantial basis exists, 'the trial court's factual determinations . . . are entitled to the same deference that an appellate court would ordinarily accord a jury's factual determinations.'" *See* Pet. App. 29a (*quoting Lane v. Hughes Aircraft Co.*, 22 Cal.4th 405, 412 (2000)). In taking such an approach, the California courts abdicated their responsibility to independently review a punitive damages award with a 10-to-1 ratio that skirted constitutionally permissible limits. The appellate court's deferential stance, in particular, highlighted the very concern expressed by this Court in *Cooper Industries* regarding "[d]ifferences in the institutional competence of trial judges and appellate judges" (532 U.S. at 440) that favored the heightened expertise of the latter.

Absent a remittitur, assessing the constitutionality of the punitive damages awarded to Petitioner would have necessitated a de novo review. It follows that the process by which a standard of review attaches to any given appeal of a punitive damages award in California is, if not arbitrary, fraught with potential for manipulation, motivating parties to initiate post-trial motions and frame appellate arguments so as to

influence, through procedural tactics, the application of one standard over another.

Certiorari is warranted so that the Court can address the conflicting standards and ensure the uniform application of de novo review in order to eliminate the continued danger of inconsistent results.

III. *NEAL*'S INCONSISTENCY WITH THIS COURT'S PRONOUNCEMENTS CONFUSES THE ROLE OF APPELLATE COURTS IN REVIEWING PUNITIVE DAMAGES.

The varying standards of review applicable to the assessment of punitive damages in California – de novo under this Court's pronouncement in *Cooper Industries* and subsequent cases; abuse of discretion under the California Supreme Court's *Neal* decision – create confusion as to the role of appellate courts reviewing those damages.

In reviewing for abuse of discretion, the appellate court gives deference to the trial court, which, when ruling on punitive damages, "sits not in an appellate capacity, but as an independent trier of fact" – or a 13th juror. *Neal*, 21 Cal.3d at 933. The appellate court in this case subscribed to that deferential view, adopting *Neal*'s dictate that the trial judge's order "not be reversed unless it plainly appears that he abused his discretion." *See* Pet. App. 28a.

A far more active role is contemplated for appellate courts under de novo review of constitutional excessiveness – "a legal issue appellate courts determine

independently." *Simon*, 35 Cal.4th at 1187. *Simon* itself, however, undercuts that broad pronouncement by requiring an appellate court to "keep in mind . . . that its constitutional mission is only to find a level higher than which an award *may not* go; it is not to find the 'right' level in the court's own view." *Id.* at 1188. "In enforcing federal due process limits, an appellate court *does not sit as a replacement for the jury* but only as a check on arbitrary awards." *Id.* at 1188 (emphasis added).

Differing standards of review are not only unjust to parties, they create confusion for appellate courts. When it comes to punitive damages, appellate courts in California are sent mixed signals as to whether they are to merely guard against trial court abuse of discretion, whether they are to independently determine excessiveness under due process considerations, or whether they are charged with ascertaining constitutionally permissible maximums. Certiorari is warranted on this issue so that appellate courts may be afforded definitive guidance in their review of punitive damages.

CONCLUSION

Despite several rulings from this Court regarding proper constitutional analysis of punitive damages, the California Supreme Court retains an alternate test, which utilizes different substantive criteria, adheres to a deferential standard of review, and is incorrectly applied to cases, including Petitioner's, yielding inconsistent results. This Court is respectfully asked to grant certiorari to resolve a key conflict between its rulings and those of the California Supreme Court in order to promote uniformity and consistency in an important area of law, punitive damages.

Respectfully submitted,

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